UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD BUSHNER 4612 Anthony Drive Coplay, PA 18037, Plaintiff, v. LIFE INSURANCE COMPANY OF NORTH AMERICA 1601 Chestnut Street Philadelphia, PA 19192, Defendant.	Civil Action No.:

COMPLAINT

Plaintiff, Edward Bushner, hereby brings this civil action against Defendant Life Insurance Company of North America (hereinafter "Defendant LINA") and states as follows in support thereof:

NATURE OF ACTION

1. This case involves a claim for long term disability benefits under the employee welfare benefit plan ("the Plan") of PPL SERVICES CORPORATION, which is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* Plaintiff seeks recovery of benefits under the Plan's long term disability ("LTD") policy ("the LTD Policy") pursuant to 29 U.S.C. § 1132(a)(1)(B). The LTD policy is insured and administered by Defendant LINA.

JURISDICTION AND VENUE

2. This court has jurisdiction over the issues raised herein pursuant to 29 U.S.C. §

1132(e)(1) and 28 U.S.C. § 1331.

3. Venue is proper in the Eastern District of Pennsylvania. *See* 29 U.S.C. §1132(e)(2) and 28 U.S.C. §1391(b).

4. ERISA provides a mechanism for administrative or internal appeal of benefits denials. *See* 29 U.S.C. §1133. Those mandatory and voluntary avenues of appeal have been exhausted in this case; therefore, this civil action has been properly filed in federal court.

PARTIES

5. Plaintiff, Edward Bushner, is an adult individual currently residing in Coplay, Pennsylvania in Lehigh County, located in the Eastern District of Pennsylvania.

6. Defendant LINA is a business entity with its principal place of business in Philadelphia, Pennsylvania, located in the Eastern District of Pennsylvania.

7. At all times relevant, the Plan constituted an "employee welfare benefit plan" as defined by 29 U.S.C. § 1002(1).

8. At all times relevant, Defendant LINA insured and administered the LTD Policy and was responsible for making claim determinations.

9. As an employee of PPL SERVICES CORPORATION, Plaintiff received LTD Policy coverage under the Plan as a "participant" as defined by 29 U.S.C. § 1002(7).

CLAIM FOR BENEFITS

10. Plaintiff, Edward Bushner, is presently 57 years old.

11. Mr. Bushner was an active, full-time employee of PPL SERVICES CORPORATION from his date of hire, September 24, 1984, through his last date worked, August 12, 2011.

12. Mr. Bushner's prior occupation was that of a Material Expediter, a Medium exertion occupation per the Dictionary of Occupational Titles.

13. Mr. Bushner has remained unable to work since his date of disability, August 13, 2011, due to the severity of his physical impairments, including but not limited to: postlaminectomy syndrome with L3-4 lumbar stenosis status post multiple surgical interventions, chronic lumbar radiculopathy with sacroiliac degeneration, and chronic venous insufficiency.

14. Mr. Bushner has a history of four low back surgeries with the first being in 1994, the second being in February of 2009, the third being a fusion surgery in December of 2011, and the fourth being a surgical removal of the fusion hardware in October of 2013.

15. Mr. Bushner filed a LTD benefit claim with Defendant LINA after his date last worked, August 12, 2011.

16. Defendant LINA approved Mr. Bushner's LTD claim payable as of February 8, 2012, after the satisfaction of the Policy's elimination period.

17. Defendant LINA paid the following twenty-four months of long term disability benefits in recognition of Mr. Bushner's inability to perform the material and substantial duties of his "Regular Occupation," i.e. a Material Expediter.

18. Defendant LINA continued to pay Mr. Bushner's LTD benefits under the "any occupation" definition of "Disability" from February 8, 2014 through March 18, 2015.

19. The February 2, 2015 medical review of Defendant LINA's paid medical consultant Dr. Rae concluded,

> *Based primarily on the history, there would be consideration for some mild impairment with the following suggested limitations. He may lift, push, pull, or carry up to 25 pounds on an occasional basis and 15 pounds on a frequent basis. There appear to be no further limitations indicated in regard to sitting, walking, standing, reaching, kneeling, or hand usage.*

20. Defendant LINA's paid medical consultant Dr. Rae found Mr. Bushner capable of a range of Medium exertion work.

21. In a February 25, 2015 letter, Defendant LINA notified Mr. Bushner that he was no longer "Disabled" from "any occupation" and terminated the payment of his benefits effective March 18, 2015.

22. Defendant LINA concluded that Mr. Bushner was capable of a light exertion occupation, i.e. "Superintendent, Construction."

23. Mr. Bushner filed a timely administrative appeal with Defendant LINA and submitted fully favorable medical evidence in support thereof.

24. Defendant LINA's paid medical consultant Dr. Kaplan's November 6, 2015 report opined that Mr. Bushner "has a complex medical history of multiple lumbar surgeries" and limited Mr. Bushner to lifting up to 5 pounds frequently or 10 pounds occasionally, with the ability to sand or walk up to 3 minutes continuously or two hours cumulatively per day, and with unrestricted sitting except for the ability to change positions for one minute each hour.

25. Defendant LINA's paid medical consultant Dr. Kaplan found Mr. Bushner capable of a range of Sedentary exertion work.

26. In a December 14, 2015 appeal decision, Defendant LINA upheld its February 25, 2015 denial of LTD benefits, this time finding Mr. Bushner was capable of sedentary work, i.e. "Superintendent, Maintenance."

27. On June 7, 2015, Mr. Bushner filed a second voluntary appeal through legal counsel and submitted fully favorable medical and vocational evidence in support thereof.

28. For Defendant LINA's consideration during the second voluntary appeal, Mr. Bushner submitted a two-day functional capacity evaluation, the medical opinion of his long-time treating primary care physician, and the independent medical examination of a board certified orthopedic surgeon, all of which concluded that Mr. Bushner was not physically capable of full-time sedentary or light exertion employment.

29. A June 5, 2016 vocational expert report concluded that Mr. Bushner was disabled from gainful employment.

30. A June 5, 2016 vocational expert report also concluded that Mr. Bushner, even if capable of full-time sedentary employment, could not meet the wage requirements of the "any occupation" standard of "Disability" based on his education, training, or experience.

31. On June 20, 2016, Defendant LINA acknowledged receipt of Mr. Bushner's request for a voluntary appeal review in writing.

32. During its' review of Mr. Bushner's second voluntary appeal, Defendant LINA ordered the paper review of a board certified neurosurgeon, Dr. Guy Corkill.

33. Dr. Corkill's report is dated July 1, 2016 with an August 25, 2016 addendum for "clarification" of Mr. Bushner's restrictions and limitations.

34. Defendant LINA's paid medical consultant Dr. Corkill cited to the two-day functional capacity evaluation and the May 2016 independent medical examination findings to conclude that, "There is sufficient evidence demonstrating that the claimant is functionally limited."

35. Defendant LINA's paid medical consultant Dr. Corkill cited to the two-day functional capacity evaluation and the May 2016 independent medical examination findings to also conclude that, "His [Mr. Bushner's] condition has not improved despite multiple surgeries and aggressive management."

36. Defendant LINA cannot establish that Mr. Bushner's physical impairments improved to where he was able to perform "all the material duties of any occupation" – specifically, full-time sedentary or light exertion employment.

37. Dr. Corkill opined that Mr. Bushner had the following restrictions and limitations:

> ***Sitting for 15 minutes with the ability to change positions or break for 15 minutes; 3 hours per 8 hour work day.***
>
> *Standing for 15 minutes with the ability to change positions or break for 15 minutes; 3 hours per 8 hour work day.*
>
> *Walking for 15 minutes with the ability to change positions or break for 15 minutes; 3 hours per 8 hour work day.*

[Emphasis added.]

38. Per Dr. Corkill, Mr. Bushner is able to sit for 15 minutes at one time, after which he would need "to change positions or break for 15 minutes."

39. Per Dr. Corkill, Mr. Bushner is limited to a total of sitting for 3 hours per 8-hour work day.

40. Per the Dictionary of Occupational Titles, "sedentary" exertion work requires "mostly sitting."

41. The March 1, 2016 two-day functional capacity evaluation concluded that Mr. Bushner was capable of sitting 13 minutes at one time for a total of 3 hours and 18 minutes during the course of an 8-hour work day.

42. The certified functional capacity examiner's March 1, 2016 report concluded that "Mr. Bushner is incapable of performing any kind of work (even at a sedentary level) in a productive, repeatable and safe manner."

43. The sitting restrictions of Defendant LINA's consulting medical specialist Dr. Corkill is consistent with the two-day functional capacity evaluation concluding Mr. Bushner cannot perform even sedentary work.

44. A September 7, 2016 vocational review of Defendant LINA's representative Cindy A. Herzog, MS, CRC concluded that Mr. Bushner was capable of full-time sedentary work per a review of the Port St. Luci, Florida labor market.

45. At the time of the September 7, 2016 vocational review, Defendant LINA was aware that Mr. Bushner resided in Coplay, PA.

46. The September 7, 2016 vocational review failed to consider, address, review, or discuss if sitting, standing, or walking for 15-minutes at one time with "the ability to change position **or break for 15 minutes**" [emphasis added] would impact Mr. Bushner's employability.

47. On September 20, 2016, one hundred and five days after Mr. Bushner's June 7, 2016 appeal was filed by facsimile, and ninety-three days after Defendant LINA acknowledged receipt of Mr. Bushner's appeal, Mr. Bushner's legal counsel was first notified by Defendant LINA's third party vendor, ECN, that Defendant LINA

intended to request that Mr. Bushner attend an independent medical examination with an internist.

48. Counsel for Mr. Bushner objected to this untimely request in letters dated September 20, 2016 and September 22, 2016 citing to the terms of the LTD policy permitting Defendant LINA ninety days in which to determine whether or not benefits are payable in accordance with the terms of the LTD policy.

49. Defendant LINA did not respond to the letters from Mr. Bushner's legal counsel in writing.

50. Defendant LINA did not respond to voice messages left for appeal adjuster Brandon Church by Mr. Bushner's legal counsel on September 23, 2016, September 28, 2016, and October 10, 2016.

51. Defendant LINA did not establish any "matters beyond its control" that caused or prompted its' untimely request for Mr. Bushner to attend an independent medical examination.

52. Defendant LINA ordered the paper review of a paid occupational medicine consultant Dr. Lee, who concluded in an October 4, 2016 report that,

> *The claimant can sit for 1 hour at a time, with a five-minute break from sitting after each hour, for a total of 8 hours per 8/hour day. The claimant can stand for 30 minutes at a time for a total of 8 hours per 8/hour day. The claimant can walk for 30 minutes at a time for a total of 8 hours per 8/hour day. The claimant can lift or carry 10 lb frequently, light or carry 11-20 lb occasionally, and push or pull max of 20 lb occasionally...*

53. An October 18, 2106 vocational review from Laura Aldridge, MS, CRC concluded that Mr. Bushner was capable of full-time sedentary work per a review of the Port St. Luci, Florida labor market.

54. At the time of the October 18, 2016 vocational review, Defendant LINA was aware that Mr. Bushner resided in Coplay, PA.

55. The October 18, 2016 vocational review only considered the restrictions and limitations of Dr. Corkill, but again failed to consider, address, review, or discuss if sitting, standing, or walking for 15-minutes at one time with "the ability to change position **or break for 15 minutes**" [emphasis added] would preclude gainful employment.

56. The October 18, 2016 vocational review of Ms. Aldridge again relies on Dr. Corkill's restriction and does not consider, address, review, or discuss the October 4, 2016 medical opinion of Defendant LINA's occupational medicine consultant.

57. With the exception of the sedentary jobs identified, the October 18, 2016 vocational review of Ms. Aldridge appears to be a near identical copy and paste of the September 7, 2016 vocational review report of Ms. Herzog.

58. On October 18, 2016, one hundred and thirty-four days after Mr. Bushner's June 7, 2016 second voluntary appeal was filed, Defendant LINA issued a final denial of Mr. Bushner's LTD claim.

59. Defendant LINA ignored and/or minimized Mr. Bushner's favorable treating and evaluating medical evidence.

60. Defendant LINA ignored and/or minimized Mr. Bushner's favorable vocational evidence.

61. The medical opinions of Defendant LINA's non-examining, paid medical consultants, Drs. Rae, Kaplan, Corkill, and Lee, contradict each other with respect to Mr. Bushner's ability to lift, carry, sit, stand, and walk.

62. Defendant LINA cannot reconcile the conflicting opinions of its' own paid medical consultants.

63. Defendant LINA ignored the fully favorable conclusions of the its' only consulting board certified neurosurgeon of record, Dr. Corkill, in the context of assessing a severe low back impairment.

64. Mr. Bushner's LTD claim file is devoid of any significant medical evidence supporting Defendant LINA's termination of benefits effective March 18, 2015.

65. Mr. Bushner's LTD claim file is devoid of any significant vocational evidence supporting Defendant LINA's termination of benefits effective March 18, 2015.

66. Defendant LINA abused the LTD policy's grant of discretionary authority, if any.

67. Defendant LINA failed to adhere to its' appeal review deadlines as expressly provided for in the LTD policy.

68. Defendant LINA failed to conduct a full and fair review of Mr. Bushner's LTD claim.

69. Defendant LINA has an inherent structural conflict of interest acting as both the administrator and insurer of the LTD Policy.

70. Mr. Bushner exhausted the Plan and LTD Policy's mandatory and voluntary administrative remedies; thus, this matter is now ripe for judicial review.

71. The determination by Defendant LINA that Mr. Bushner is not disabled effective March 18, 2105 per the terms of the LTD policy is contrary to the medical and vocational evidence of record, and is without rational support.

72. The determination by Defendant LINA that Mr. Bushner is not disabled effective March 18, 2015 is contrary to the "any occupation" definition of "Disability" per the terms of the LTD policy.

73. Defendant LINA's decision to terminate Mr. Bushner's long term disability benefits effective March 18, 2015 was arbitrary and capricious.

74. As a direct and proximate result thereof, based on the evidence submitted to Defendant LINA establishing that Mr. Bushner met the LTD policy's definition of "Disability" continuously beyond March 18, 2015, Plaintiff is entitled to payment of monthly benefits retroactive from March 19, 2015, the first day benefits were not paid, through present. These benefits should be continued as long as Plaintiff remains disabled in accordance with the terms of the Plan and LTD policy.

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WHEREFORE, Plaintiff prays for the following relief:

A. That the Court enter judgment in Plaintiff's favor and against Defendant; and

B. That the Court order Defendant to pay disability to Plaintiff in an amount equal to the contractual amount of benefits to which Plaintiff is entitled; and

C. That the Court order Defendant to pay Plaintiff prejudgment interest on all benefits that have accrued prior to the date of judgment; and

D. That the Court award Plaintiff attorney's fees pursuant to 29 U.S.C. § 1132(g); and,

E. That Plaintiff recover any and all other relief to which Plaintiff may be entitled, including but not limited to remand to Defendant LINA for further administrative proceedings, as well as the costs of suit.

Respectfully submitted,

By: ______________________________

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